87-1397

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

LLOYD BOERSMA and PHYLLIS BOERSMA,
For Themselves and All Persons Similarly Situated,

Plaintiffs-Appellants,

vs.

DONNA KARNES, Nebraska State Tax Commissioner;
and NEBRASKA DEPARTMENT OF REVENUE,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the Court below improperly held that neither the provisions of 42 U.S.C.S. § 407 nor those of 26 U.S.C.S. § 86 preclude the State of Nebraska from taxing Social Security benefits under NEB. REV. STAT. § 77-2715 (1983 Supp.).

Whether the Court below improperly held that a tax on Social Security benefits under NEB. REV. STAT. § 77-2715 (1983 Supp.) is not an unconstitutional burden on the power of Congress to provide for the general welfare in violation of the Supremacy Clause contained at Art. VI., cl. 2 of the United States Constitution.

LIST OF PARTIES

All Appellants are listed in the caption of the Notice of Appeal contained at Appendix C (App. 19). Lloyd Boersma died on June 26, 1986. On October 1, 1986, the Supreme Court of the State of Nebraska entered an Order of Revivor allowing Kathrine A. Boersma, Personal Representative of the Estate of Lloyd Boersma, to proceed with the appeal on behalf of Lloyd Boersma. All Appellees are listed in the caption of the Notice of Appeal contained at Appendix C (App. 19). Appellants do not believe that the provisions of 28 U.S.C.S. § 2403(b) are applicable because the State of Nebraska is a party to this proceeding and has been represented at all stages of this proceeding by the Attorney General of the State of Nebraska.

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Pursuant to Rules 12.3 and 15 of the Rules of the Supreme Court of the United States, Lloyd Boersma and Phyllis Boersma, Appellants, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska appears in *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) and is included herein as Appendix A (App. 1). The judgment of the District Court of Nuckolls County, Nebraska is included as Appendix B (App. 18).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action to recover a refund of state income taxes paid on Social Security benefits received by the Appellants. The judgment of the Supreme Court of the State of Nebraska affirming the decision of the District Court of Nuckolls County, Nebraska, was entered January 8, 1988. A timely notice of appeal was filed on January 28, 1988, in the Supreme Court of the State of Nebraska. A copy of the Notice of Appeal was timely filed with the District

Court of Nuckolls County, Nebraska, on January 28, 1988. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, subparagraph (2). Cases that sustain the jurisdiction of this Court include: *R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, et al.*, (1986, U.S.), 107 S. Ct. 499, 93 L.Ed.2d 449 (1986); *Xerox Corp. v. County of Harris Texas, et al.*, 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982). This case involves a statute of the State of Nebraska which is claimed to be repugnant to the Constitution and laws of the United States. The decision of the Supreme Court of the State of Nebraska was in favor of the validity of the statute of the State of Nebraska. Appellants request that this appeal be regarded and acted on as a petition for writ of certiorari if this appeal is improvidently taken or if the proper mode of review is by petition for certiorari as provided in 28 U.S.C.S. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of NEB. REV. STAT. § 77-2715 (1983 Supp.), which subjects Social Security benefits to state income taxation, is set out verbatim in Appendix D (App. 25). NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be repugnant to 42 U.S.C.S. § 407. The text of 42 U.S.C.S. § 407 is set out verbatim in Appendix D (App. 25). NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be

repugnant to the Supremacy Clause contained in Art. VI., cl. 2 of the Constitution of the United States. The text of Art. VI., cl. 2 is set out verbatim in Appendix D (App. 26).

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follow: Appellants filed a U.S. Individual Income Tax Return for 1984 on Form 1040 and included one-half (1/2) of total Social Security benefits of Twenty Thousand Seven Hundred Ninety-Eight and No/100 Dollars ($20,798.00) received by Appellants in total income for federal tax purposes. Appellants also filed a Nebraska Individual Income Tax Return for 1984 on Form 1040N. The Nebraska income tax liability was computed by applying a percentage to the federal tax liability under NEB. REV. STAT. § 77-2715 (1983 Supp.). The computation under NEB. REV. STAT. § 77-2715 (1983 Supp.) resulted in a state tax liability to Appellants of Three Thousand One Hundred Fourteen and No/100 Dollars ($3,114.00). This amount included Seven Hundred Sixty-Six and No/100 Dollars ($766.00) which was attributable to a state tax on Social Security benefits received by Appellants. Appellants filed a claim for refund consistent with applicable law claiming that Social Security benefits were not subject to state income taxation. The claim was denied by Appellees, and Appellants filed an action in the District Court of Nuckolls County, Nebraska, consistent with applicable law to obtain a refund of state income taxes. Appellants raised the federal questions at the initial stages of the

proceedings in pleadings filed with the District Court of Nuckolls County, Nebraska. The District Court of Nuckolls County, Nebraska, rejected the arguments of Appellants in regard to the federal questions, denied Appellants' Motion for Summary Judgment and allowed Appellees' Motion for Summary Judgment holding, as a matter of law, that the State of Nebraska was allowed to impose a state income tax on Social Security benefits. Appellants timely appealed to the Supreme Court of the State of Nebraska. The federal questions were raised upon appeal at the initial stages of the proceedings in the Assignment of Errors contained in the Brief of Appellants. The Supreme Court of the State of Nebraska rejected the arguments of Appellants in regard to the federal questions and affirmed the decision of the District Court of Nuckolls County, Nebraska. The pertinent quotations from the opinion of the Supreme Court of the State of Nebraska contained at *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) of a nature to bring the case within the jurisdiction of the Supreme Court of the United States are as follows:

> (1) The Supreme Court of the State of Nebraska noted: "When this return was filed in 1985 for the 1984 tax year, the Nebraska income tax liability was computed by applying the appropriate state income tax rate to the federal tax liability. See NEB. REV. STAT. Section 77-2715(1) (Supp. 1983). This computation resulted in state tax liability for plaintiffs of $3,114. This figure included $766 which was attributable to state taxation of Social Security benefits." 227 Neb. at 331;
>
> (2) The Supreme Court of the State of Nebraska noted: "Plaintiffs first contend that the Nebraska tax on plaintiff's Social Security benefits results in

an unconstitutional burden of the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the 'supremacy clause.' " 227 Neb. at 332; and

(3) The Supreme Court of the State of Nebraska noted: "Plaintiffs then contend that 42 U.S.C. § 407 precludes Nebraska from taxing these benefits." 227 Neb. at 335.

Appellants have not requested the clerk of the court possessed of the record to certify it and provide for its transmission as provided in Rule 13 of the Rules of the Supreme Court of the United States. Appellants do not deem the record to be essential to a proper understanding of the case within the meaning of Rule 13 of the Rules of the Supreme Court of the United States.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that a state income tax on Social Security benefits is repugnant to the Constitution and laws of the United States. The grounds of this appeal are substantial because the State of Nebraska has imposed a tax on Social Security benefits in violation of the Constitution and laws of the United States. The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution because a large number of residents of the State of Nebraska have been subject to a tax on Social Security benefits since 1984 in violation of the Constitution and

the laws of the United States. The residents of the State of Nebraska that have been subject to a state income tax on Social Security benefits are all residents who are subject to a federal income tax on Social Security benefits and are either single taxpayers with gross income in excess of Twenty-Five Thousand and No/100 Dollars ($25,000.00) or married taxpayers who file joint returns with gross income in excess of Thirty-Two Thousand and No/100 Dollars ($32,000.00). *See* 26 U.S.C.S. § 86. A determination as to whether Social Security benefits are subject to state taxation would also affect the power of states other than Nebraska to impose a state tax on Social Security benefits. The nature of the case and of the court rulings are such as to bring the case within jurisdictional provisions because the Supreme Court of the State of Nebraska has upheld the validity of a state statute which is claimed to be repugnant to the Constitution and laws of the United States within the meaning of 28 U.S.C.S. § 1257(2).

NEB. REV. STAT. § 77-2715 (1983 Supp.) is claimed to be repugnant to the provisions of 42 U.S.C.S. § 407. According to 42 U.S.C.S. § 407:

> "§ 407. Assignment
>
> (a) The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> (b) No other provision of law, enacted before, on, or after the date of the enactment of this section

> [enacted Aug. 14, 1935], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."

In clear and unambiguous language, 42 U.S.C.S. § 407 provides that the right of any person to Social Security payments is not transferable or assignable. A state tax on Social Security benefits may be interpreted as a transfer or assignment. In addition, none of the moneys paid are subject to execution, levy, attachment, garnishment, or other legal process. A state tax on Social Security benefits may subject moneys paid to levy or other legal process. In the context of taxation, the term "levy" means the legislative function and declaration of the subject and rate or amount of taxation. *See State v. Brian*, 84 Neb. 30, 120 N.W. 916 (1909); *People v. Mahoney*, 13 Cal.2d 729, 91 P.2d 1029 (1939); *City of Richmond v. Eubank*, 179 Va. 70, 18 S.E.2d 397 (1942).

The term "levy" has been used by Congress in other instances to refer to a tax. *See* 4 U.S.C.S. § 107; 49 U.S.C.S. § 1513.

In several recent cases, the Supreme Court of the United States has used the words "levy" and "tax" interchangeably. In *United States v. New Mexico, et al.*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 580 (1982), the Supreme Court of the United States noted:

> "Thus, immunity may not be conferred simply because the *tax* has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the *levy*." (Emphasis added). 455 U.S. at 734.

In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S. Ct. 291, 78 L.Ed.2d 10 (1983), the Supreme Court of the United States noted:

> ". . . The manner in which the state legislature has described and categorized § 239-6 cannot mask the fact that the purpose and effect of the provision are to impose a *levy* upon the gross receipts of airlines. . . . A state statute that imposes such a *tax* is therefore pre-empted." (Emphasis added). 464 U.S. at 13-14.

In *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 93 S. Ct. 590, 34 L.Ed.2d 608 (1973), the Supreme Court of the United States considered the effect of 42 U.S.C.S. § 407 and concluded:

> ". . . The language is all inclusive: '[N]one of the moneys paid or payable . . .under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process. . . .' " 409 U.S. at 415.

The Supreme Court of the United States continued:

> "But § 407 does not refer to any 'claim of creditors'; it imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State." 409 U.S. at 416-417.

The prohibition against assignment of Social Security benefits under 42 U.S.C.S. § 407 is broad enough to bar a State from taxing Social Security benefits.

The conclusion that 42 U.S.C.S. § 407 prohibits a state tax on Social Security benefits is supported by an understanding of the relationship between 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86.

The effect of 42 U.S.C.S. § 407 is to prohibit assignment of Social Security benefits. The effect of 26 U.S.C.S. § 86 is to subject Social Security benefits to federal income taxation.

According to 26 U.S.C.S. § 86:

"§ 86. Social security and tier 1 railroad retirement benefits.

(a) In general.

Gross income for the taxable year of any taxpayer described in subsection (b) includes (notwithstanding section 207 of the Social Security Act [42 USCS § 407]) social security benefits in an amount equal to the lesser of–

(1) one-half of the social security benefits received during the taxable year, or

(2) one-half of the excess described in subsection (b)(1)."

There is an express reference in 26 U.S.C.S. § 86 to 42 U.S.C.S. § 407. The reference is required since the prohibition against assignment of Social Security benefits in 42 U.S.C.S. § 407 may not be modified except by express reference.

On April 20, 1983, both 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86 were amended by the same Act. According to Pub.L. 98-21. Title III, Part C, Section 335, 97 Stat. 130:

"NONASSIGNABILITY OF BENEFITS

Sec. 335. (a) Section 207 of the Social Security Act is amended–

(1) by inserting '(a)' before 'The right'; and

(2) by adding at the end thereof the following new subsection:

'(b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.'.

(b)(1) . . .

(2)(A) Section 86(a) of the Internal Revenue Code of 1954 (as added by section 121(a) of this Act) is amended by inserting '(notwithstanding section 207 of the Social Security Act)' before 'includes'.

. . .

(c) The amendments made by subsection (a) shall apply only with respect to benefits payable or rights existing under the Social Security Act on or after the date of the enactment of this Act."

Since 26 U.S.C.S. § 86 expressly refers to 42 U.S.C.S. § 407, it is clear that 26 U.S.C.S. § 86 modifies 42 U.S.C.S. § 407 as required by 42 U.S.C.S. § 407(b). If 26 U.S.C.S. § 86 modifies 42 U.S.C.S. § 407, then 42 U.S.C.S. § 407 must have prohibited what is sought to be accomplished by 26 U.S.C.S. § 86. Otherwise, there would be no need for 26 U.S.C.S. § 86 to expressly refer to 42 U.S.C.S. § 407 as required by 42 U.S.C.S. § 407(b). 26 U.S.C.S. § 86 subjects Social Security benefits to a federal income tax. As a result, 42 U.S.C.S. § 407 must be interpreted to prohibit a tax on Social Security benefits but for the express modification of 42 U.S.C.S. § 407 to allow a federal tax on Social Security benefits under 26 U.S.C.S. § 86. The amendment to 26 U.S.C.S. § 86 does not modify 42 U.S.C.S. § 407 to allow a state tax on Social Security benefits.

As a result, 42 U.S.C.S. § 407 must be interpreted as a prohibition against a tax on Social Security benefits because of the need for an express modification of 42 U.S.C.S. § 407 to allow a federal income tax on Social Security benefits. This conclusion is supported by a reference in a leading tax service. According to Research Institute of America Federal Tax Coordinator 2d, Section J-1430:

> "This inclusion rule applies notwithstanding section 207 of the Social Security Act (42 USC § 407; 42 USCS § 407) (which provides that no other provision of law may be construed to limit or modify the right of any person to social security payments, except to the extent it does so by express reference to sec. 207)."

The meaning of 42 U.S.C.S. § 407 may be determined by reference to other factors. In *Ellender v. Schweiker*, 575 F. Supp. 590 (S.D.N.Y., 1983), the United States District Court for the Southern District of New York considered the meaning of 42 U.S.C.S. § 407 and noted:

> "The meaning of a statute may be discerned by a review of its language, intent and legislative history." *Id.* at 598.

The United States District Court for the Southern District of New York noted:

> " 'The starting point in every case involving the construction of a statute is the language itself.' . . . The literal words used in § 207(a) are clear and unambiguous: '[t]he right of any person to any future payment [of OASDI] shall not be transferable or assignable [or] . . . subject to . . . other legal process.' Regarding this section, the Supreme Court has stated that 'section 407 . . . imposes a

broad bar against the use of any legal process to reach all social security benefits.' *Philpott v. Essex County Welfare Board*, 409 U.S. 413, 417, 93 S. Ct. 590, 592, 34 L.Ed.2d 608 (1973)." *Id.* at 598.

According to the United States District Court for the Southern District of New York:

"The second factor which must be considered in construing a statute is its intent. . . . OASDI was created to provide for the care and maintenance of the elderly, survivors, and the disabled. . . . Section 207(a) was promulgated to protect social security benefits from the reach of creditors. . . ." *Id.* at 598.

According to the United States District Court for the Southern District of New York:

"Legislative history provides the third source of interpretation of statutes. . . . The legislative history of the Social Security Act, enacted originally in 1935 and amended in 1939, fails to discuss section 207(a). However, section 207(b), enacted on April 20, 1983 in order to restrict modification of section 207(a), is briefly elaborated upon in legislative history which reveals that, after the passage of the Bankruptcy Reform Act of 1978, hundreds of cases considered social security and SSI benefits of debtors to be income for purposes of a Chapter XIII bankruptcy. Section 207(b) was passed to prohibit assignment of these benefits 'notwithstanding any other provisions of law.' H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad.News 143, 301-302." *Id.* at 599.

According H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad.News 143, 301-302:

"Section 336. Nonassignability of benefits

Since 1935 the Social Security Act has prohibited the transfer or assignment of any

> future social security or SSI benefits payable and further states that no money payable or rights existing under the Act shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.
>
> Based on the legislative history of the Bankruptcy Reform Act of 1978, some bankruptcy courts have considered social security and SSI benefits listed by the debtor to be income for purposes of a Chapter XIII bankruptcy and have ordered SSA in several hundred cases to send all or part of a debtor's benefit check to the trustee in the bankruptcy.
>
> *Your Committee's bill specifically provides that social security and SSI benefits may not be assigned notwithstanding any other provisions of law*, including P.L. 95-598, the 'Bankruptcy Reform Act of 1978'. This provision would be effective upon enactment." (Emphasis added).

The language of 42 U.S.C.S. § 407 has been interpreted to impose a broad bar against the use of any legal process to reach all Social Security benefits. The language of 42 U.S.C.S. § 407 is broad enough to bar a state from imposing an income tax on Social Security benefits. The intent of 42 U.S.C.S. § 407 was to protect Social Security benefits from the reach of creditors. An income tax imposed by a state on Social Security benefits would frustrate the intent of 42 U.S.C.S. § 407 to protect Social Security benefits against assignment. The legislative history regarding 42 U.S.C.S. § 407 indicates that Social Security benefits may not be assigned notwithstanding any other provisions of law. An income tax imposed by a state on Social Security benefits would deprive the benefit recipient of a portion of the Social Security benefits.

A review of the language, intent and legislative history of 42 U.S.C.S. § 407 results in the conclusion that a state may not impose an income tax on Social Security benefits.

The prohibition against assignment of Social Security benefits under 42 U.S.C.S. § 407 is similar to the prohibition against assignment of railroad retirement benefits under 45 U.S.C.S. § 231m as follows:

> "§ 231m. Assignability; exemption from levy (a) Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated."

The language of 45 U.S.C.S. § 231m includes "levy" in the caption and "tax" in the body. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979), the Supreme Court of the United States compared 45 U.S.C.S. § 231m to 42 U.S.C.S. § 407 and noted:

> "Like anti-attachment provisions generally, see *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973); *Wissner v. Wissner*, *supra*, it ensures that the benefits actually reach the beneficiary. It pre-empts all state law that stands in its way. It protects the benefits from legal process '[notwithstanding] any other law . . . of any State.' " 439 U.S. at 584.

The Court continued:

> "We, however, cannot so lightly discard the settled view that anti-assignment statutes have substantive meaning. Section 231m goes far beyond garnishment. It states that the annuity shall not be subject to any 'legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.' " 439 U.S. at 586.

The dissenting opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) noted:

> "The Court also noted that the state-court judgment, insofar as it ordered the diversion of future payments as soon as they were paid to the beneficiary, was contrary to a provision in the Act protecting such payments from 'seizure . . . either before or after receipt by the beneficiary.' " 439 U.S. at 596.

See also Wissner v. Wissner, 338 U.S. 655, 70 S. Ct. 398, 94 L.Ed. 424 (1950).

In light of these decisions, the judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska could be viewed as a seizure contrary to 42 U.S.C.S. § 407.

The dissenting opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979) also discussed the intent of 45 U.S.C.S. § 231m and noted:

> "The drafters of the original legislation expressly stated that one of the important features of any retirement plan was a guarantee to the worker of an 'absolute' right to receive the pension. *Id.* at 11." 439 U.S. at 602.

A similar "absolute" right to receive Social Security benefits applies to Social Security benefit recipients

under 42 U.S.C.S. § 407. This "absolute" right to receive Social Security benefits may not be affected by an income tax imposed by a state.

The Supreme Court of the State of Nebraska rejected Appellants' argument that a state tax violated 42 U.S.C.S. § 407 in the opinion contained at *Boersma v. Karnes*, 227 Neb. 329, ___ N.W.2d ___ (1988) as follows:

> "We hold that neither the provisions of 42 U.S.C. § 407 nor those of I.R.C. § 86 preclude the State of Nebraska from taxing the portion of plaintiffs' Social Security benefits reported as federal taxable income." 227 Neb. at 338.

A substantial and important federal question exists as to whether a state tax on Social Security benefits violates the provisions of 42 U.S.C.S. § 407 and 26 U.S.C.S. § 86. This question requires plenary consideration.

A substantial and important federal question also exists as to whether a state tax on Social Security benefits frustrates the Congressional objective of providing Social Security benefits to recipients.

In *Maryland, et al v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L.Ed 2d 576 (1981), the Supreme Court of the United States noted:

> "The Supremacy Clause provides that '[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding. Art. VI., cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect." 451 U.S. at 746.

If state taxation of Social Security benefits impedes the congressional objectives in regard to the Social Security Act, the state tax violates the Supremacy Clause. *See R. J. Reynolds Tobacco Co. v. Durham County, North Carolina, et al.*, (1986, U.S.), 107 S. Ct. 499, 93 L.Ed.2d 449 (1986); *Xerox Corp. v. County of Harris Texas, et al.*, 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982); *McGoldrick, Comptroller of City of New York v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L.Ed.2d 840 (1940). *See also Rice, et al. v. Santa Fe Elevator Corp., et al.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L.Ed. 1447 (1947); *Mayo, et al. v. United States*, 319 U.S. 441, 63 S. Ct. 1137, 87 L.Ed. 1504 (1943).

The Supreme Court of the United States has held that a state tax violated the Supremacy Clause in a variety of situations. In *White Mountain Apache Tribe, et al. v. Bracker, et al.*, 448 U.S. 136, 100 S. Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court of the United States held that a state tax on contractors performing services on an Indian reservation undermined the federal policy of regulating tribal affairs under the Indian Commerce Clause, Art. I, Section 8, cl. 3. In *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 104 S. Ct. 291, 78 L.Ed.2d 10 (1983), the Supreme Court of the United States held that a state tax on the annual gross income of airlines violated a federal statute passed as a part of a federal policy to regulate the air transportation system. In *Maryland, et al. v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981), the Supreme Court of the United States held that a "first-use" tax imposed on pipeline companies interfered with the federal regulation of the transportation and sale of natural gas in interstate commerce. In

Xerox Corp. v. Harris Texas, et al., 459 U.S. 145, 103 S. Ct. 523, 74 L.Ed.2d 323 (1982), the Supreme Court of the United States held that a state tax violated a federal scheme to establish a customs system which included provisions for government supervised bonded warehouses. *See also McGoldrick, Comptroller of City of New York v. Gulf Oil Corp.*, 309 U.S. 414, 60 S. Ct. 664, 84 L.Ed.2d 840 (1940).

Congress enacted the Social Security Act to provide for the general welfare under Article I, Section 8 of the United States Constitution. The constitutional power of Congress to enact the Social Security Act was upheld by the United States Supreme Court in *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937). Congress has expressed the intent that only Congress may alter, amend or repeal the Social Security Act. According to 42 U.S.C.S. § 1304:

> "The right to alter, amend or repeal any provision of this Act is hereby reserved to the Congress."

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979), the Supreme Court of the United States compared 45 U.S.C.S. § 231m to 42 U.S.C.S. § 407 and noted:

> "Congress has made a choice, and § 231m protects it. It is for Congress to decide how these finite funds are to be allocated. The statutory balance is delicate. Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic dimunition of that amount frustrates the congressional objective. . . . Section 231m shields the distribution of benefits from state decisions that would actually reverse the flow of incentives Congress originally intended." 429 U.S. at 585.

The Court continued:

"An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check." 439 U.S. at 588.

The Court continued:

"Any such anticipation threatens harm to the employee, and corresponding frustration to federal policy, over and above the mere loss of wealth caused by the offset." 439 U.S. at 589.

The Court continued:

"For the present, however, the community property interest that respondent seeks conflicts with § 231m, promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect. It thus causes the kind of injury to federal interests that the Supremacy Clause forbids. It is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S. 590.

The objectives of Congress in protecting benefits received under the Railroad Retirement Act have been compared to the objectives of Congress in protecting benefits received under the Social Security Act. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979). By enacting the Social Security Act, Congress intended to provide for the general welfare by shifting wealth through the payment of Social Security benefits. Congress intended that the recipient receive the Social Security benefits. A state tax on Social Security benefits frustrates the congressional objective of providing Social Security benefits to the recipient.

The Supreme Court of the State of Nebraska agreed with Appellants' argument as to the federal purpose of the Social Security Act in the opinion contained at 227 Neb. 329, ___ N.W.2d ___ (1988) as follows:

> "We agree with plaintiffs' depiction of Congress' rationale for passing the Social Security Act. Plaintiffs cite *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937), where the U.S. Supreme Court discussed the authority of Congress to enact the Social Security Act and the purpose of the act:
>
> > Congress may spend money in aid of the 'general welfare.' Constitution, Art, I, section 8. . . .
> >
> > . . . .
> >
> > . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near. 301 U.S. at 640-641." 227 Neb. at 333.

However, the Supreme Court of the State of Nebraska rejected Appellants' argument that a state tax on Social Security benefits frustrated the congressional objectives as follows:

> "Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree." 227 Neb. at 333.

A substantial and important federal question exists as to whether a state tax on Social Security benefits frustrates the Congressional objective of providing Social Security benefits to recipients. This question requires plenary consideration.

CONCLUSION

For the reasons stated above, Appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

KATHRINE A. BOERSMA, Personal Representative of the Estate of LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants

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APPENDIX A

Opinion of the Supreme Court
of the State of Nebraska

Nebraska Advance Sheets
BOERSMA v. KARNES
Cite as 227 Neb. 329

LLOYD BOERSMA AND PHYLLIS BOERSMA, APPELLANTS, V. DONNA KARNES, NEBRASKA TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLEES.
___ N.W.2d ___

Filed January 8, 1988. No. 86-196.

1. Actions: Taxation: Parties. An action cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed.

2. ___: ___: ___. Neb. Rev. Stat § 77-2793 (Reissue 1986), which provides a procedure by which a taxpayer may obtain a refund of overpayment of income taxes, is exclusive and does not provide for class actions.

3. Statutes: Taxation. As a general rule of statutory construction, exemptions from taxation are to be narrowly construed.

4. Taxation: Social Security. Neither the provisions of 42 U.S.C. § 407 (Supp. III 1985) nor those of I.R.C. § 86 (Supp. III 1985) preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.

5. ___: ___. The provisions of 31 U.S.C. § 3124 (1982) do not preclude the State of Nebraska from taxing the portion of Social Security benefits reported as federal taxable income.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Michael L. Johnson of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., AND COLWELL, D.J., Retired.

GRANT, J.

Plaintiffs-appellants, Lloyd and Phyllis Boersma, filed a U.S. income tax return for 1984 on form 1040 and included one-half of their total Social Security benefits as income for federal tax purposes. Plaintiffs also filed a Nebraska individual income tax return for 1984 on form 1040N. Pursuant to Nev. Rev. Stat. § 77-2795 (Reissue 1986), plaintiffs filed a claim for refund with defendant-appellee Donna Karnes, Nebraska Tax Commissioner. Plaintiffs contended that since one-half of their Social Security benefits had been indirectly taxed by the State of Nebraska, they were entitled to a refund in the amount of $766. In addition, plaintiffs claimed a refund on behalf of all other taxpayers similarly situated.

The claim was denied by the Tax Commissioner on August 13, 1985. Pursuant to Nev. Rev. Stat. § 77-2798 (Reissue 1986), plaintiffs then filed a petition in district court, for themselves and all taxpayers similarly situated, seeking review of defendant Tax Commissioner's denial of the refund claim. Defendants answered and then moved for summary judgment. The district court granted defendants' motion, holding that there were no issues of material fact and that, as a

matter of law, the State of Nebraska was allowed to base the income tax due Nebraska on a portion of Social Security benefits reported on plaintiffs' federal income tax return and that defendant Tax Commissioner was correct in denying plaintiffs' refund claim. The district court did not decide the question of whether a class action was allowable in this type of action. Plaintiffs timely appealed.

The issue in this case arises as a result of certain changes made by Congress in the federal Internal Revenue Code. Until January 1, 1984, Social Security benefits and tier 1 railroad retirement benefits were not included in gross income and therefore were not subject to federal income tax. Before that time, the Internal Revenue Service held that insurance benefit payments to individuals under the provisions of the Social Security Act were not includable in the gross income of the recipients.

Congress modified this general exclusion effective on January 1, 1984, by a change in the law, which is codifed at I.R.C. § 86 (Supp. III 1985). This change results in a portion of Social Security benefits being includable in gross income. Generally, the new law results in including one-half of Social Security benefits in gross income if the taxpayer's gross income plus Social Security benefits is over $25,000 ($32,000 for married, jointly filing taxpayers). For example, in the instant case, plaintiffs' gross income (including Social Security benefits) was over $88,000. As a result, one-half of their total Social Security benefits of $20,798 was includable in their gross income. The applicable federal tax rate was applied to this gross income figure, which generated plaintiffs' federal tax liability.

When this return was filed in 1985 for the 1984 tax year, the Nebraska income tax liability was computed by applying the appropriate state income tax rate to the federal tax liability. See Neb. Rev. Stat. § 77-2715(1) (Supp. 1983). This computation resulted in a state tax liability for plaintiffs of $3,114. This figure included $766 which was attributable to state taxation of Social Security benefits.

In their appeal plaintiffs set out two assignments of error: (1) that the district court erred when it refused to allow plaintiffs to maintain a class action under Neb. Rev. Stat. § 25-319 (Reissue 1985) for a refund of state income taxes on behalf of all persons similarly situated, and (2) that the district court erred when it granted defendants' motion for summary judgment, holding, in effect, that as a matter of law a portion of plaintiffs' Social Security benefits is subject to state income tax. We affirm.

Plaintiffs allege that the seeking of refunds of state income taxes is a proper matter for a class action pursuant to § 25-319. Such an assertion is contrary to the established rule in this state that an action "cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf." *Hansen v. County of Lincoln*, 188 Neb. 461, 465, 197 N.W.2d 651, 655 (1972), *supp. op.* 188 Neb. 798, 197 N.W.2d 655; *State ex rel. Sampson v. Kenny*, 185 Neb. 230, 175 N.W.2d 5 (1970); *Willms v. Nebraska City Airport Authority*, 193 Neb. 567, 228 N.W.2d 276 (1975).

In *State ex rel. Sampson v. Kenny*, *supra* at 232-33, 175 N.W.2d at 7, we stated:

> It is clearly the policy of the Legislature in setting up a refund statute to require individual action. Taxes ordinarily paid under a mistake of law are not recoverable, and the refund statute gives special relief in this situation. The county treasurer's duty arises only on a taxpayer's individual application. The legislature is authorized and may properly, on considerations of public policy, require individual applications and it is not mere speculation to suggest that this requirement is related to the security of the public treasury.

Neb. Rev. Stat. § 77-2793 (Reissue 1986) provides a procedure by which a taxpayer may obtain a refund of an overpayment of income taxes. This statutory procedure is exclusive and does not provide for class actions. In the absence of specific statutory authority waiving governmental immunity to permit representative suits, class actions cannot be maintained to recover taxes paid. Neb. Rev. Stat. §§ 77-2793 through 77-27,101 (Reissue 1986), the sections which pertain to income tax refunds, refer to actions brought by the taxpayer, with no mention of class actions.

Although *Sampson*, *supra*, and *Hansen*, *supra*, both involved property tax assessments rather than income tax, this court finds these cases controlling. We are not persuaded by plaintiffs' attempt to distinguish class actions in property tax cases from those involving, as in the instant case, income taxes. This court has repeatedly recognized the rule requiring individual actions in obtaining tax refunds. Plaintiffs' action in this case should not be treated as a class action.

With regard to plaintiffs' other assignment of error, plaintiffs do not contend that there is any fact question presented, but that the court erred as a matter of law.

Plaintiffs first contend that the Nebraska tax on plaintiffs' Social Security benefits results in an unconstitutional burden on the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the "supremacy clause." Plaintiffs state that "[t]he determining question is whether the income tax imposed by the State of Nebraska on Social Security benefits operates to 'retard, impede, burden, or in any manner control' the constitutional power of Congress to provide for the general welfare under the Social Security Act." Brief for Appellants at 6. Plaintiffs then assert that "[i]f the State of Nebraska has the power to tax Social Security benefits, it has the power to destroy the purposes of the Social Security Act." *Id.* That assertion is not correct.

We recognize that should Congress forbid the various states to tax federal Social Security benefits, in whole or in part, even though the federal government itself chose to tax such benefits, the federal law would control. Indeed, that is what has happened in this case, and the State of Nebraska has recognized the supremacy of federal law. See the later discussion herein comparing the effect of 45 U.S.C. § 231m (Supp. III 1985) (concerning the nontaxability of tier 1 railroad retirement benefits) and 42 U.S.C. § 407 (Supp. III 1985) (concerning the taxability of Social Security benefits). Until 1984, the Congress did not permit any taxation of Social Security benefits, and no taxing authority, federal or state, taxed such benefits.

Congress, with the passage in 1983 of the law codified at I.R.C. § 86, granted the federal government the power to tax Social Security benefits to a defined, limited extent by, in effect, dividing Social Security benefits into two categories–benefits going to persons with a

gross income greater than $25,000 for single taxpayers (or $32,000 for married, jointly filing taxpayers) and benefits going to those receiving less than those amounts. Section 86 requires only those individuals who are higher income taxpayers (as distinguished from "lower-income individuals" mentioned in the legislative history below) to include a portion of their Social Security benefits in gross income. Other taxpayers do not include any portion of their Social Security benefits in gross income.

We agree with plaintiffs' depiction of Congress' rationale for passing the Social Security act. Plaintiffs cite *Helvering v. Davis*, 301 U.S. 619, 57 S. Ct. 904, 81 L.Ed. 1307 (1937), where the U.S. Supreme Court discussed the authority of Congress to enact the Social Security Act and the purpose of the act:

> Congress may spend money in aid of the "general welfare." Constitution, Art. I, section 8. . . .
>
> . . . .
>
> . . . The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

301 U.S. at 640-41.

Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree. When Congress modified the act in 1983, it in no way departed from the above-stated purpose. The legislative history of this modification explains the congressional policies and purposes behind the extension of federal taxation to a portion of these benefits.

> Your committee believes that the present policy of excluding all social security benefits from a

> recipient's gross income is inappropriate. Your Committee believes that social security benefits are in the nature of benefits received under other retirement systems, which are subject to taxation to the extent they exceed a worker's after-tax contributions and that taxing a portion of social security [sic] benefits will improve tax equity by treating more nearly equally all forms of retirement and other income that are designed to replace lost wages (for example, unemployment compensation and sick pay). . . .
>
> . . . .
>
> By taxing only a portion of social security and railroad retirement benefits (that is, up to one-half of benefits in excess of a certain base amount). Your Committee's bill assures that lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits. The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions. The bill's method for taxing benefits assures that only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive.

H.R. Rep. No. 25, 98th Cong., 1st Sess. 24, *reprinted in* 1983 U.S. Code Cong. & Admin. News 219, 242.

It is clear, in light of the above-enunciated rationale, that Congress determined that federal taxation of higher income taxpayer's benefits did not adversely affect the purposes of the Social Security Act. The Congress deliberately lifted a defined portion of Social Security benefits into a category subject to federal tax. A state's indirect recognition of this taxable category does not, in any degree, give the state "the power to destroy the purposes of the Social Security Act," as

alleged by plaintiffs. Taxation of these Social Security benefits by states is always subject to disallowance by federal act, but that disallowance has not yet been enacted.

> That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied.

M'Culloch v. State of Maryland, 17 U.S. 415, 432, 4 Wheat. 316, 4 L.Ed. 579 (1819). Plaintiffs seem to imply that only the federal goverment is concerned about the care of people in financial difficulty because of age or other reasons and that only the federal government is concerned about retirement benefits in general. The State of Nebraska is vitally, and more immediately, concerned in those same areas. See, e.g., Neb. Rev. Stat. §§ 43-501 to 43-515 (Reissue 1984), 43-601 to 43-680 (Reissue 1984), 68-104 to 68-1521 (Reissue 1986), 71-516 to 71-518 (Reissue 1986), and 71-1401 to 71-1554 (Reissue 1986).

Plaintiffs then contend that 42 U.S.C. § 407 precludes Nebraska from taxing these benefits. Section 407 states, in pertinent part:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Plaintiffs contend that the word "levy" as used in § 407 refers to a tax levy and, therefore, that § 407 prohibits Nebraska from taxing Social Security benefits. If the word "levy," as used within the context of § 407, does mean "tax," the statute would act to preclude state taxation of these benefits. The thrust of plaintiffs' argument on this point rests on plaintiffs' contention as to the meaning of "levy" in § 407.

"Levy" is a term which is susceptible to divergent meanings, depending on how the word is used. When "levy" is used as a noun, Black's Law Dictionary provides two conceptually different definitions. "Levy" is initially defined in Black's as follows: "A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of money for which an execution has been issued." Black's Law Dictionary 816 (5th ed. 1979). Black's further defines "levy" as:

> In reference to taxation, the word may mean the legislative function and declaration of the subject and rate or amount of taxation. . . . "Levy," when used in connection with authority to tax, denotes exercise of legislative function, whether state or local, determining that a tax shall be imposed and fixing amount, purpose and subject of the exaction.

Id.

In order to ascertain which of these two definitions should be adopted for purposes of construing § 407, it is appropriate to examine the word "levy" within the context of the statutory language which surrounds it.

The word must be read in context with the remainder of the statute. Section 407 states that Social Security benefits shall not be "subject to execution, levy,

attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The words surrounding "levy" in this statute operate to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. Viewing the provision of § 407 in its entirety, we hold that plaintiffs' argument that the word "levy" is the equivalent of "tax" is without merit. In context with the remainder of the statute, the word "levy" refers to the enforcement of a judgment or other legal process involving the collection of debts through execution, attachment, garnishment, or levy.

Other courts have reached the same general conclusion. See *Matter of Neavear*, 674 F.2d 1201, 1205 (7th Cir. 1982), where the court stated:

> By its terms section 207 [42 U.S.C. § 407] is concerned with the protection of social security benefits from the reach of creditors. . . .
>
> . . . Section 207 speaks throughout in terms of the rights of social security *recipients* . . . and the protection of their *benefits* from the reach of creditors (through "execution, levy, attachment, garnishment, or other legal process").

(Emphasis in original.) Without more, § 407 clearly does not exclude state taxation of Social Security benefits.

Plaintiffs then argue that I.R.C. § 86 provides an additional indication of congressional intent with regard to the taxation of these benefits. This statute,

which results in a portion of Social Security benefits becoming subject to federal taxation, states in relevant part: "(a) In general. Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407]) includes social security benefits in an amount equal to the lesser of. . . ."

Plaintiffs point to the parenthetical clause in subsection (a) "(notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407])," and argue that if § 407 is not interpreted as prohibiting a tax on Social Security benefits, Congress would not have bothered to modify § 407 in I.R.C. § 86. The relevant portion of § 407 is set out above. Plaintiffs contend that the inclusion of this parenthetical statement is a clear indication that Congress interprets § 407 as a prohibition against a tax on these benefits. We do not agree, and hold that § 407 is not a specific indication of congressional intent to prohibit state taxation of Social Security benefits. As stated above, § 407 is concerned only with the protection of Social Security benefits from legal proceeding by creditors.

As a general rule of statutory construction, exemptions from taxation are to be narrowly construed. *Bingler v. Johnson*, 394 U.S. 741, 89 S. Ct. 1439, 22 L.Ed.2d 695 (1969). A section from the Railroad Retirement Act, 45 U.S.C. § 231m, provides us with an example of expressed congressional intent to exclude benefits from state taxation. Tier 1 benefits are those portions or railroad retirement benefits which are analogous to the Social Security benefits in this case. Tier 1 benefits were specifically excluded from state taxation in § 231m, which states in part:

> (a) Except as provided in . . . the Internal Revenue Code of 1954 [26 U.S.C. § 1 et seq.], notwithstanding any other law of the United States, *or of any State*, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process. . . .

(Emphasis supplied.)

Use of the word "tax" in § 231m indicates that Congress clearly recognizes the distinction between the words "tax" and "levy" in the context of exclusionary statutes, and clearly sets out how to exclude federal benefits from state taxation. We hold that neither the provisions of 42 U.S.C. § 407 nor those of I.R.C. § 86 preclude the State of Nebraska from taxing the portion of plaintiffs' Social Security benefits reported as federal taxable income.

Nebraska's recognition of the federal supremacy rights is further shown in the terms of Nebraska income tax form 1040N. That form, on line 25 of schedule II, specifically authorizes "adjustments decreasing federal taxable income, such as interest or dividend income from U.S. government bonds, other U.S. obligations, or Tier I or II benefits paid by Railroad Retirement Board." As set out above, § 231m expressly forbids state taxation of railroad retirement benefits. Nebraska does not tax those benefits. Also, as set out above, there is no such comparable federal statute prohibiting a state tax on Social Security benefits. Nebraska, therefore, taxes such benefits. The actions of the state have recognized the "supremacy clause."

We note that plaintiffs pled in paragraph 18 of their petition in the district court that the

> reduction for Tier I or II benefits paid by the Railroad Retirement Board with no reduction for Social Security benefits is discriminatory and constitutes unequal treatment of persons similarly situated, without a rational basis for distinction, thereby violating the equal protection clause of the Fourteenth Amendment to the United States Constitution, and Article I, Section 25 of the Nebraska Constitution.

Plaintiffs have not mentioned or discussed this issue in their brief. It is not properly before this court. We do not, therefore, discuss this issue.

Plaintiffs then contend that 31 U.S.C. § 3124 (1982) results in Social Security benefits being exempt from state taxation. Section 3124 states in relevant part: "(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State."

Plaintiffs make two arguments in support of their position. They first contend that payment of Social Security benefits is an obligation of the U.S. government and is thus exempt from state taxation by the terms of § 3124. In the same manner they choose to construe the word "levy" as set out above, plaintiffs attribute a different meaning to the word "obligation" than is warranted by the statute.

"Obligation" may be a "duty"or "the act of obligating oneself to a course of action"; that is, in this case, the United States has recognized its duty to support its citizens in their later years or in emergencies. "Obligation" may also be "an investment security (corporate bonds and other obligations)." Webster's Third New International Dictionary, Unabridged 1556 (1981).

In § 3124, the meaning of "obligation" is that of an investment security, a financial instrument. A state may not tax the interest on such an obligation. In *State ex rel. Douglas v. Karnes*, 216 Neb. 750, 760, 346 N.W.2d 231, 236 (1984), this court held that *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 103 S. Ct. 692, 74 L.Ed.2d 562 (1983), "was the death knell for state franchise taxes discriminating against federal obligations. . . ." The Nebraska opinion discussed the adverse effects of Nebraska's attempting to levy a tax on income from federal obligations while at the same time exempting interest income from state securities. It is clear the *Karnes* case was concerned with state taxation of interest being earned on federal "obligations" in the sense obligations are investment securities. We are not concerned with such "obligations" in this case.

This conclusion is buttressed when the source of § 3124 is examined. That source was 31 U.S.C. § 742 (1976), effective in 1959, which provided, in pertinent part: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." The explanatory note following § 3124 states that the words: "Except as otherwise provided by law, all . . . bonds, Treasury notes, and other" contained in former § 742 were "omitted as surplus." The Congress recognized that "stocks and obligations" as expressed in § 3124 means "stocks, bonds, Treasury notes, and other obligations of the United States," as stated in former § 742.

Regarding the statutory exemption provided under § 742, the U.S. Supreme Court, in *Smith v. Davis*, 323

U.S. 111, 116-17, 65 S. Ct. 157, 89 L.Ed. 107 (1944), stated:

> [Section 742] on its face applies only to written interest-bearing obligations issued pursuant to Congressional authorization. Stocks, bonds, and Treasury notes are obviously of that nature. And, under the rule of *ejusdem generis*, it is reasonable to construe the general words "other obligations," which allegedly cover open accounts, as referring only to obligations or securities of the same type as those specificially enumerated. . . . This interpretation is in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit. It is unnecessary to extend such tax exemption, at least through statutory interpretation, to non-interest-bearing claims or obligations which the United States does not use or need for credit purposes.

Plaintiffs then argue that Social Security benefits are obligations of the U.S. government by virtue of the fact that the Federal Old-Age and Survivors Insurance Trust Fund invests in securities held by the Secretary of the Treasury. Plaintiffs state in their brief that the Social Security tax revenues which will ultimately be paid out to recipients are placed in this trust fund and that the portion of the trust fund not required to meet current benefit payments is invested in interest-bearing obligations of the United States under 42 U.S.C. § 401(d) (Supp. III 1985). Plaintiffs then contend that "[t]he Social Security benefits paid by the federal government represent the proceeds of United States obligations. . . ." Brief for Appellants at 10. It is not possible for this court to know if plaintiffs' statement is an

accurate reflection of how the laws of the United States operate, but we do determine that the Nebraska income tax in this case does not operate as a tax on the interest generated by any U.S. financial security or obligation, but operates on moneys received, in the nature of retirement annuities, by a Nebraska resident. Section 3124 does not prohibit the tax in question.

The arguments of plaintiffs are not persuasive. The order of the district court granting defendants' motion for summary judgment was correct and is affirmed.

AFFIRMED.

APPENDIX B

Judgment of the District Court of Nuckolls County, Nebraska

The Judgment of the District Court of Nuckolls County, Nebraska, was entered on February 19, 1986, as follows:

IN THE DISTRICT COURT OF
NUCKOLLS COUNTY NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants.	)	Docket 22 Page 41 Case No. 5878 *JUDGMENT*

The Plaintiffs' Motion for Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted because there are no material facts at issue which might entitle Plaintiffs to the tax refund claimed in their Petition.

Dated: February 19, 1986.

BY THE COURT:

Orville L. Coady, District Judge

APPENDIX C

NOTICE OF APPEAL

The Notice of Appeal was filed in the Supreme Court of the State of Nebraska on the 28th day of January, 1988, as follows:

IN THE SUPREME COURT OF
THE STATE OF NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants-Appellees.	Case No. 86-196 *NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

Notice is hereby given that Lloyd Boersma and Phyllis Boersma, the Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, entered in this proceeding on January 8, 1988.

A copy of this Notice of Appeal has been filed with the District Court of Nuckolls County, Nebraska, at Case No. 5878, Docket 22, Page 41.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Dated this 28th day of January, 1988.

KATHERINE A. BOERSMA, Personal Representative of the Estate of LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants

BY LUEBS, DOWDING, BELTZER, LEININGER, SMITH & BUSICK
Wheeler at First Street
P.O. Box 790
Grand Island, Nebraska 68802
Telephone: (308) 382-1930

By /s/ Michael L. Johnson
Michael L. Johnson, #015090

STATE OF NEBRASKA)
) ss:
COUNTY OF HALL)

I, Michael L. Johnson, depose and say that I am an attorney in the office of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, Wheeler at First Street, P.O. Box 790, Grand Island, Nebraska 68802, attorney of record for Lloyd Boersma and Phyllis Boersma, Plaintiffs-Appellants herein, and that on January 28, 1988, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal on each of the parties required to be served herein as follows:

On DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, the Defendants-Appellees herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert M. Spire,

Attorney General, and L. Jay Bartel, Assistant Attorney General, counsel of record for said Defendants-Appellees, at their office at 2115 State Capitol, Lincoln Nebraska 68509-4906.

All parties required to be served have been served.

By /s/ Michael L. Johnson
Michael L. Johnson, #015090

Subscribed and sworn to before me this 28th day of January, 1988.

/s/ Marietta Smidt
Notary Public

(SEAL)
Commission expires January 29, 1992.

A copy of the Notice of Appeal was filed in the District Court of Nuckolls County Nebraska, on the 28th day of January, 1988, as follows:

IN THE DISTRICT COURT OF
NUCKOLLS COUNTY, NEBRASKA

LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs, vs. DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, Defendants.	Docket 22 Page 41 Case No. 5878 *NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES*

Notice is hereby given that Lloyd Boersma and Phyllis Boersma, the Plaintiffs-Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska affirming the judgment of the District Court of Nuckolls County, Nebraska, entered in this proceeding on January 8, 1988.

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Dated this 28th day of January, 1988.

KATHERINE A. BOERSMA, Personal Representative of the Estate of LLOYD BOERSMA and PHYLLIS BOERSMA, For Themselves and All Persons Similarly Situated, Plaintiffs-Appellants

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By /s/ Michael L. Johnson
Michael L. Johnson, #015090

STATE OF NEBRASKA)
) ss:
COUNTY OF HALL)

I, Michael L. Johnson, depose and say that I am an attorney in the office of Luebs, Dowding, Beltzer,

Leininger, Smith & Busick, Wheeler at First Street, P.O. Box 790, Grand Island, Nebraska 68802, attorney of record for Lloyd Boersma and Phyllis Boersma, Plaintiffs-Appellants herein, and that on January 28, 1988, pursuant to Rule 33, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal on each of the parties required to be served herein as follow:

> On DONNA KARNES, Nebraska State Tax Commissioner; and NEBRASKA DEPARTMENT OF REVENUE, the Defendants-Appellees herein, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to Robert M. Spire, Attorney General, and L. Jay Bartel, Assistant Attorney General, counsel of record for said Defendants-Appellees, at their office at 2115 State Capitol, Lincoln Nebraska 68509-4906.
>
> All parties required to be served have been served.
>
> By /s/ Michael L. Johnson
> Michael L. Johnson, #015090

Subscribed and sworn to before me this 28th day of January, 1988.

/s/ Marietta Smidt
Notary Public

(SEAL)
Commission expires January 29, 1992.

APPENDIX D

Statutory Provisions Involved

NEB. REV. STAT. § 77-2715 (Supp. 1983):

"77-2715. *Income tax; rates; terms, defined; credits.* (1) A tax is hereby imposed for each taxable year on the entire income of every resident individual of this state and on the income of every nonresident individual of this state which is derived from sources within this state. The tax shall be a flat percentage of, for each resident individual, the taxpayer's adjusted federal income tax liability for the taxable year, and for each nonresident individual, the taxpayer's adjusted federal income tax liability for the taxable year which is attributable to income derived from sources within this state.

The taxpayer's adjusted federal income tax liability shall be the amount of federal income tax, as determined under Subtitle A, Chapter I, subchapter A, Pars I, V, and VI of the Internal Revenue Code, for which the taxpayer would have been liable if such taxpayer had paid federal income tax based on federal taxable income as adjusted by the modifications provided in section 77-2716 without any allowance for credits against such tax permitted under the Internal Revenue Code.

The adjusted federal income tax liability of each nonresident individual taxpayer which is attributable to income derived from sources within this state shall be determined by multiplying his or her adjusted federal income tax liability by a fraction, the numerator of which is his or her taxable income derived from sources within this state as determined by section 77-2733, and the denominator of which is his or her total federal taxable income, after first subtracting from each the amounts provided in subsection (1) of section 77-2716; *Provided*, that if the above determination attributes more or less federal income tax than is reasonably attributable to income derived from sources within this state, the taxpayer may petition for, or the Tax Commissioner may require, the employment of any other method to attribute an amount of

federal income tax which is reasonable and equitable in the circumstances.

(2)(a) A resident of this state shall mean an individual who is domiciled in Nebraska or who maintains a permanent place of abode in this state and spends in the aggregate more than six months of the taxable year in this state; and

(b) A nonresident shall mean an individual who is not a resident of this state.

(3) There shall be allowed, to qualified resident individuals as a credit against the tax imposed by sections 77-2714 to 77-27,135, a credit for the elderly equal to fifty per cent of the federal credit allowed under section 37 of the Internal Revenue Code.

(4) Subject to termination under section 66-1055, there shall be allowed to individuals as a credit against the tax imposed by sections 77-2714 to 77-27,135, a credit for renewable energy source systems as provided under section 66-1047."

42 U.S.C.S. § 407:

"§ 407. *Assignment.*

(a) The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) No other provision of law, enacted before, on, or after the date of the enactment of this section [enacted Aug. 14, 1935], may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."

United States Constitution, Art. VI, cl. 2:

"Clause 2, Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Supreme Court, U.S.
FILED
MAR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1337

In The

Supreme Court of the United States

October Term, 1987

LLOYD BOERSMA and PHYLLIS BOERSMA,

Plaintiffs-Appellants,

vs.

DONNA KARNES, Nebraska State Tax Commissioner, and NEBRASKA DEPARTMENT OF REVENUE,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

MOTION TO DISMISS APPEAL

PREPARED BY:

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Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, the Appellees move that the appeal herein taken be dismissed on the ground that the appeal does not present a substantial federal question.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska in *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988), affirming the judgment of the District Court of Nuckolls County, Nebraska, is referred to in the jurisdictional statement. Both the opinion of the Nebraska Supreme Court and the judgment of the District Court of Nuckolls County, Nebraska, are included in the Appendix to Appellants' jurisdictional statement.

GROUNDS OF JURISDICTION OF SUPREME COURT

The jurisdictional requisites are adequately set forth in the Appellants' jurisdictional statement.

CONSTITUTIONAL PROVISIONS AND STATUTES

Pertinent constitutional and statutory provisions are set forth in Appendix D of Appellants' jurisdictional statement

STATEMENT OF THE CASE

Appellants Lloyd Boersma and Phyllis Boersma filed a Form 1040 U.S. Individual Income Tax Return, and a Form 1040N Nebraska Individual Income Tax Return, for the year 1984. Appellants reported income from social security benefit payments in the amount of $20,798.00 on their Federal Form 1040 return. One-half of the amount of these social security benefits were subject to federal income tax in 1984. The inclusion by Appellants of their income from social security benefit payments on their Federal Form 1040 return for 1984 was required following the passage by Congress of Pub.L.No. 98-21, §121, 97 Stat. 80 (*codified at* 26 U.S.C. §86 (Supp. III 1985)).

Pursuant to Neb.Rev.Stat. §77-2715(1) (Supp. 1983), the Nebraska resident individual income tax for 1984 was determined by applying the applicable Nebraska percentage rate to the taxpayer's federal income tax liability for the taxable year, as adjusted by the modifications decreasing federal taxable income permitted by Neb.Rev.Stat. §77-2716 (Supp. 1983). Appellants, by virtue of their inclusion of a portion of their social security payments as income on their federal return, and being subjected to federal income tax liability on this amount, were required to pay individual Nebraska income tax based on the applicable percentage rate as applied to their federal income tax liability, which included federal tax liability incurred as a result of their receipt of social security income.

Appellants filed a claim for refund with the Nebraska State Tax Commissioner in the amount of $766.00,

resulting from their asserting entitlement to an adjustment decreasing their federal taxable income by one-half of the social security benefit income received by Appellants during the taxable year. The State Tax Commissioner denied Appellants' refund claim. Appellants subsequently filed an action in the District Court of Nuckolls County, Nebraska, seeking review of the Tax Commissioner's denial of the refund claim, pursuant to Neb.Rev.Stat. §77-2798 (Reissue 1986). The district court granted the Tax Commissioner's motion for summary judgment. On appeal, the Nebraska Supreme Court affirmed the decision of the District Court of Nuckolls County, Nebraska. *Boersma v. Karnes*, 227 Neb. 329, 417 N.W.2d 341 (1988). Specifically, the Nebraska Supreme Court rejected Appellants' contention that the imposition of Nebraska State Income Tax based on Appellants' federal tax liability (which included liability resulting from the inclusion of social security benefit income) resulted "in an unconstitutional burden on the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the 'supremacy clause'." *Id.* at 332, 417 N.W.2d at 344. The court also rejected Appellants' contention that the imposition of Nebraska State Income Tax under the circumstances was precluded by the provisions of 42 U.S.C. §407 (Supp. III 1985). *Id.* at 335, 417 N.W.2d at 346.

ARGUMENT

I.

THE NEBRASKA STATE INCOME TAX IMPOSED UNDER NEB.REV.STAT. §77-2715(1) (SUPP. 1983) IS NOT PRECLUDED BY THE PROHIBITION AGAINST THE ASSIGNMENT OF SOCIAL SECURITY BENEFITS CONTAINED IN 42 U.S.C. §407 (SUPP. III 1985).

Appellants' principal contention challenges the right of the State of Nebraska to impose state income tax under Neb.Rev.Stat. §77-2715(1) (Supp. 1983) on the basis of Appellants' federal tax liability, which, by virtue of the provisions of I.R.C. §86, included liability incurred on a portion of Appellants' income from the receipt of social security payments for the tax year in question. Appellants assert the operation of the Nebraska income tax statute in this manner is contrary to the prohibition against the assignment of social security benefit payments contained in 42 U.S.C. §407 (Supp. III 1985). Subsection (a) of 42 U.S.C. §407 provides:

> The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to *execution, levy, attachment, garnishment, or other legal process*, or to the operation of any *bankruptcy or insolvency law*. (Emphasis added).

An examination of the plain language of 42 U.S.C. §407(a) reveals the prohibition contained in this section has no application whatsoever under the facts of this

case. This section provides the rights of any person to social security benefit payments shall not be subject to "execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." Appellants, in their amended petition filed in the District Court of Nuckolls County, Nebraska, alleged the prohibitions against "levy" or "other legal process" in 42 U.S.C. §407(a) applied in this instance.

The word "levy," when utilized as a noun as in 42 U.S.C. §407, is defined in *Black's Law Dictionary*, 816 (5th Ed. 1979) as

> A seizure. The obtaining of money by legal process through seizure and sale of property; the raising of the money for which an execution has been issued.

The phrase "legal process" is defined in *Black's Law Dictionary*, 1085 (5th Ed. 1979) as follows:

> This term is sometimes used as equivalent to "lawful process." Thus, it is said that legal process means process not merely fair on its face, but in fact valid. *But properly it means a summons, writ, warrant, mandate, or other process issuing from a court.* (Emphasis added).

Furthermore, with regard to the general language of 42 U.S.C. §407 referring to "other legal process," the Appellees submit that, under the rule of *ejusdem generis*, this general phrase must be construed to refer only to matters of the same kind as specifically enumerated in 42 U.S.C. §407. *Smith v. Davis*, 323 U.S. 111, 117 (1944). Thus, the phrase "other legal process" should be construed to refer only to matters involving

the issuance of process from a court, as the specific listing of "execution," "levy," "attachment," "garnishment," and "bankruptcy" proceedings clearly contemplate protecting such benefit payments from being subjected to loss through legal actions involving the collection of debts.

Appellants seek to interpret the word "levy" in 42 U.S.C. §407 to apply to the assessment of a tax. While it is true that the word "levy" is sometimes used in the context of taxation, it is obvious that, construing the provisions of 42 U.S.C. §407 in their entirety, it is not employed in this manner in 42 U.S.C. §407.

The word "levy" is an ambiguous term, and its meaning is dependent upon the particular context in which it is used. *Hale v. Whitlock Oil Service, Inc.*, 450 F.2d. 170, 174 (10th Cir. 1971). When used as a noun, the word "levy" means "[a] seizure; the raising of money for which an execution has been issued." *Plaxico v. Webster*, 175 S.C. 69, 178 S.E. 270 (1935). *See also Burkett v. Clark*, 46 Neb. 466, 64 N.W. 1113 (1895). The definition of "levy" contained in the Uniform Enforcement of Foreign Judgments Act provides:

> "Levy" means to take control of or create a lien upon property under any judicial writ or process whereby satisfaction of a judgment may be enforced against such property.

Uniform Enforcement of Foreign Judgments Act §1(c), 13 U.L.A. 183 (1986).

It is fundamental that, in construing statutory provisions, "[t]he meaning of particular phrases must be determined in context." *SEC v. National Securities*,

Inc., 393 U.S. 453, 466 (1969). Furthermore, "[i]t is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977) (footnote omitted). Consistent with these fundamental principles of statutory interpretation, the Nebraska Supreme Court, in rejecting Appellants' assertion that the word "levy" in 42 U.S.C. §407 is the equivalent of the word "tax", stated:

> The word must be read in context with the remainder of the statute. Section 407 states that Social Security benefits shall not be "subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." The words surrounding "levy" in this statute operate to protect the Social Security benefits, which may be paid to persons such as plaintiffs, from judicial proceedings against persons such as plaintiffs. Judgment creditors in legal proceedings may not use the proceeds of the Social Security system to satisfy private obligations. Viewing the provision of § 407 in its entirety, we hold that plaintiffs' argument that the word "levy" is the equivalent of "tax" is without merit. In context with the remainder of the statute, the word "levy" refers to the enforcement of a judgment or other legal process involving the collection of debts through execution, attachment, garnishment, or levy.

Boersma v. Karnes, *supra*, 227 Neb. at 336, 417 N.W.2d at 346-47.

In spite of the plain meaning of the language contained in 42 U.S.C. §407, Appellants nevertheless contend the reference to this section in I.R.C. §86 indicates Congress views 42 U.S.C. §407 as a prohibition against

taxation of social security benefits. I.R.C. §86, which, as previously indicated, subjects to federal income taxation a portion of the social security benefit income of certain taxpayers, provides, in pertinent part: "(a) In general. Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding Section 207 of the Social Security Act [42 U.S.C. §407]) includes social security benefits in an amount equal to the lesser of. . . ." The Nebraska Supreme Court, refusing to accept Appellants invitation to employ this parenthetical reference in I.R.C. §86 as a means to alter the plain meaning of 42 U.S.C. §407, stated:

> Plaintiffs point to the parenthetical clause in subsection (a) "(notwithstanding section 207 of the Social Security Act [42 U.S.C. § 407])," and argue that if § 407 is not interpreted as prohibiting a tax on Social Security benefits, Congress would not have bothered to modify § 407 in I.R.C. § 86. The relevant portion of § 407 is set out above. Plaintiffs contend that the inclusion of this parenthetical statement is a clear indication that Congress interprets § 407 as a prohibition against a tax on these benefits. We do not agree, and hold that § 407 is not a specific indication of congressional intent to prohibit state taxation of Social Security benefits. As stated above, § 407 is concerned only with the protection of Social Security benefits from legal proceeding by creditors.

Boersma v. Karnes, *supra*, 227 Neb. at 337, 417 N.W.2d at 347

It is a general rule of statutory construction that exemptions from taxation are to be narrowly construed. *Bingler v. Johnson*, 394 U.S. 741 (1969). If Congress

had intended to exclude social security benefit payments, taxed at the federal level, from state taxation, specific language could have been provided in 42 U.S.C. §407(a) to achieve this result. Significantly, 45 U.S.C. §231m (Supp. III 1985), a portion of the Railroad Retirement Act, specifically provides that annuity benefits received under the Act are not " . . . subject to any *tax* or to garnishment, attachment, or other legal process." (Emphasis added). As the Nebraska Supreme Court stated: "Use of the word 'tax' in §231m indicates that Congress clearly recognizes the distinction between the words 'tax' and 'levy' in the context of exclusionary statutes, and clearly sets out how to exclude federal benefits from state taxation." *Boersma v. Karnes*, *supra*, 227 Neb. at 338, 417 N.W.2d at 347.

Appellants also seek to attach significance to an amendment to 42 U.S.C. §407 enacted in 1983, providing:

> (b) No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

In *Ellender v. Schweiker*, 575 F.Sup. 590, 599 (S.D.N.Y. 1983), the court, discussing the purpose behind the adoption of this amendment, stated:

> . . . section 207(b) [42 U.S.C. §407(b)], enacted on April 20, 1983 in order to restrict modification of section 207(a), is briefly elaborated upon in legislative history which reveals that, after the passage of the Bankruptcy Reform Act of 1978, hundreds of cases considered social security and SSI benefits of

> debtors to be income for purposes of a Chapter XIII bankruptcy. Section 207(b) was passed to prohibit assignment of these benefits 'notwithstanding any other provisions of law.' H.Rep. No. 1900, Pub.L. 98-21, 98th Cong., 1st Sess. 82-83, reprinted in [1983] U.S. Code Cong. & Ad. News 143, 301-302.

Thus, it is evident that the adoption of 42 U.S.C. §407(b) was designed to prevent federal bankruptcy courts from treating social security benefits of debtors as income available for payments to creditors under bankruptcy plans. This is entirely consistent with the interpretation that 42 U.S.C. §407(a) is limited to protecting social security benefits from the reach of creditors seeking to obtain such funds by legal process. The amendment to 42 U.S.C. §407(b) in no way alters the scope of the language contained in 42 U.S.C. §407(a), and cannot be construed to preclude the State of Nebraska from imposing an income tax based on federal tax liability which includes federal taxes paid as a result of the taxation of social security income under I.R.C. §86.

On the basis of the foregoing, Appellees submit it is clear the Nebraska Supreme Court correctly determined that neither the provisions of 42 U.S.C. §407 nor those of I.R.C. §86 preclude the State of Nebraska from imposing a state income tax based on the federal tax liability calculated by the inclusion of social security benefit income. As it is apparent that the Appellants claim that the imposition of Nebraska state income tax under such circumstances is prohibited by the federal statutes referred to is without merit, the Court should dismiss this appeal on the ground that the claimed

conflict between state and federal law does not present a substantial federal question.

II.

THE NEBRASKA STATE INCOME TAX STATUTES ARE CONSISTENT WITH FEDERAL LAW, AND DO NOT CONFLICT WITH OR IMPEDE THE POWERS OF THE FEDERAL GOVERNMENT IN VIOLATION OF THE SUPREMACY CLAUSE.

Appellants, by virtue of the fact that they were required to pay Nebraska individual income tax on the basis of federal tax liability calculated by including a portion of their social security income as federal taxable income, also contend the State of Nebraska has imposed a tax which unconstitutionally burdens the power of Congress to provide for the general welfare, in violation of U.S. Const. art. VI, cl. 2, the Supremacy Clause. Appellees submit that Appellants' constitutional argument in this regard fails to present a substantial federal question warranting plenary consideration by this Court.

Both the state and the national governments possess the authority to impose income taxes. This Court has recognized that "[t]he state and national governments must co-exist," and that "[e]ach must be supported by taxation of those who are citizens of both." *Helvering v. Gerhardt*, 304 U.S. 405, 422 (1938). The power of a state to tax, as well as the power of the federal government, is founded upon the protections and privileges afforded by government to the recipients of such income. *See Graves v. New York ex rel. Keefe*, 306 U.S. 466 (1939). The seminal case of *McCulloch v. Maryland*,

17 U.S. (4 Wheat.) 316, 424 (1819), contains the following language recognizing the dual taxing powers of Congress and the states:

> That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied.

Appellants emphasize that, in *Helvering v. Davis*, 301 U.S. 619 (1937), this Court upheld the authority of Congress to enact the Social Security Act under the power granted under Article I, Section 8 of the U.S. Constitution, to tax and provide for the general welfare. Appellants assert that, if they are required to pay Nebraska income tax on social security benefit income which is taxed at the federal level, the state has acted in contravention of the national policies and purposes underlying the enactment of the Social Security Act.

This Court has frequently stated that, in cases involving the claimed invalidity of state law under the Supremacy Clause, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311, 317 (1981), *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). *See also Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 522 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1981). In *Commonwealth Edison*

Co. v. Montana, 453 U.S. 609 (1981), the Court, in reliance upon the above-quoted principle, held a Montana severance tax imposed on coal mined in the state was not invalid unde the Supremacy Clause on the ground that the tax frustrated and impaired national energy policies. Rejecting the argument that a violation of the Supremacy Clause could be founded upon such general national policy and purpose arguments, the court stated:

> In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), we rejected a pre-emption argument similar to the one appellants urge here. There, it was argued that the "basic national policy favoring free competition" reflected in the Sherman Act pre-empted a state law regulating retail distribution of gasoline. *Id.*, at 133. The Court acknowledged the conflict between the state law and this national policy, but rejected the suggestion that the "broad implications" of the Sherman Act should be construed as a congressional decision to pre-empt the state law. *Id.*, at 133-134. Cf. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U. S. 96, 110-111 (1978).
>
> * * *
>
> In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict. (Footnote omitted).

Id. at 633-34.

As noted previously, the imposition of state income tax on the basis of federal tax liability (including federal income tax imposed by virtue of the receipt of social security income) is not precluded by any specific federal statute. Furthermore, it is evident that the

operation of the Nebraska individual income tax statute at issue does not conflict with the specific, articulated policy established by Congress in mandating the taxation of social security benefit income.

The extension of federal income taxation to income attributable to social security benefit payments received by certain individuals was mandated by Congress with the passage of Pub.L.No. 98-21 §121, 97 Stat. 80 (*codified at* 26 U.S.C. §86 (Supp. III 1985)). This statute requires social security benefits to be included in the gross income of "higher income" taxpayers (single individuals with over $25,000 of income and married individuals filing joint returns with income in excess of $32,000). The legislative history of this provision explains the congressional policies and purposes behind the extension of tax liability upon such income as follows:

> Your Committee believes that the present policy of excluding all social security benefits from a recipient's gross income is inappropriate. Your Committee believes that social security benefits are in the nature of benefits received under other retirement systems, which are subject to taxation to the extent they exceed a worker's after-tax contributions and that taxing a portion of social security benefits will improve tax equity by treating more nearly equally all forms of retirement and other income that are designed to replace lost wages (for example, unemployment compensation and sick pay.)
>
> * * *
>
> By taxing only a portion of social security and railroad retirement benefits (that is, up to one-half of benefits in excess of a certain base amount). Your

> Committee's bill assures that lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits. The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions. The bill's method for taxing benefits assures that only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive.

H.R. Report No. 25, 98th Cong., 1st Sess. 24, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 219, 242.

Clearly, the tax treatment of social security income received by individuals such as Appellants emanates from a congressional policy determination that, with respect to benefit payments received by certain "higher income" taxpayers, a portion of those benefits should be treated as income subject to taxation. The Nebraska income tax statutes, by basing individual income tax liability on a percentage of federal income tax liability, including federal taxes imposed as a result of the receipt of social security income, are not inconsistent with and do not conflict with articulated congressional policy. The Nebraska Supreme Court, after considering the policy evidenced by congressional action requiring the taxation of social security income received by certain taxpayers, concluded Appellants' Supremacy Clause claim was without merit, stating:

> Plaintiffs assert that *any* state taxation of these benefits burdens the act's operation. We disagree.
>
> * * *
>
> It is clear . . . that Congress determined that

> federal taxation of higher income taxpayer's benefits did not adversely affect the purposes of the Social Security Act. The Congress deliberately lifted a defined portion of Social Security benefits into a category subject to federal tax. A state's indirect recognition of this taxable category does not, in any degree, give the state "the power to destroy the purposes of the Social Security Act," as alleged by plaintiffs.

Boersma v. Karnes, *supra*, 227 Neb. at 333-34, 417 N.W.2d at 345-46.

Thus, while it is apparent that the Nebraska individual income tax statutes do not operate in a manner which conflicts with any federal statute, it is also clear that the state has not imposed any unconstitutional burden on the power of the federal government, as asserted by Appellants. The state has in no manner imposed a tax directly on social security benefit income, and the operation of the Nebraska statutes only affects social security recipients who fall within the "higher income" class of recipients required to pay tax on such income under federal law. It should be noted that Appellants, for the tax year in question, reported a federal adjusted gross income of over $88,000.00. *Boersma v. Karnes*, *supra*, 227 Neb. at 330, 417 N.W.2d at 344. While this Court in *Helvering v. Davis*, *supra*, noted the hope of the Social Security Act was "to save men and women from the rigors of the poor house," it would appear Appellants are in no need of such salvation. Undoubtedly, Congress has recognized that, with respect to certain "higher income" taxpayers, the extension of income tax liability to a portion of their social

security income represents a legitimate and sound policy judgment. The Appellees submit that the State of Nebraska has in no way acted to impair or burden the powers exercised by the federal government in a manner inconsistent with congressional policy, and, therefore, no violation of the Supremacy Clause exists by virtue of the operation of the Nebraska income tax statutes under these circumstances.

On the basis of established constitutional standards relating to the scope of the Supremacy Clause, it is evident that Appellants' contention that the operation of the Nebraska state income tax statutes results in an unconstitutional violation of the Supremacy Clause is meritless. Accordingly, the Court should dismiss this appeal on the ground that the asserted constitutional violation does not present a substantial federal question requiring plenary consideration by the Court.

CONCLUSION

For the reasons stated above, Appellees respectfully request the Court to dismiss this appeal on the ground that no substantial federal question is presented.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether a Nebraska law imposing a state income tax on a portion of its taxpayers' social security benefits is preempted by Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), or by the federal social-security program as a whole, 42 U.S.C. (& Supp. IV) 401 *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Under 26 U.S.C. (Supp. IV) 86, added by the Social Security Amendments of 1983, Pub. L. No. 98-21, §§ 121, 335(b)(2)(A), 97 Stat. 80-81, 130,

certain higher income persons must include up to one-half of their social security benefits in gross income for federal income-tax purposes. The taxpayers covered are those whose "modified adjusted gross income," as defined in 26 U.S.C. (Supp. IV) 86(b)(2), plus one-half of their social security benefits, exceeds a prescribed "base amount." 26 U.S.C. (Supp. IV) 86(b). One-half of such excess or one-half of the social security benefits, whichever is less, must be included in gross income. 26 U.S.C. (Supp. IV) 86(a). The "base amount" is $32,000 for married persons who file a joint return; $25,000 for single persons as well as for married persons who file separately and live apart throughout the year; and zero for married persons who file separately but live together (this treats such a married couple as "an integral unit" (S. Rep. 98-23, 98th Cong., 1st Sess. 27 (1983))). 26 U.S.C. (Supp. IV) 86(c). "Social security benefits" for purposes of the tax provision are both benefits received under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, and "tier 1 railroad retirement benefit[s]" received under 45 U.S.C. (& Supp. III) 231b, 231c. 26 U.S.C. (Supp. IV) 86(d).[1]

2. Appellants Lloyd and Phyllis Boersma, a married couple, filed a joint return in 1984. They received sufficient income in that year to require, pursuant to 26 U.S.C. (Supp. IV) 86, that they include in their gross income one-half of their social security benefits received under Title II of the Social

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[1] The statute also contains special rules governing adjustments for taxpayers' repayments of "social security benefits," receipt of certain worker's compensation benefits, and receipt of lump-sum payments. 26 U.S.C. (Supp. IV) 86(d) and (e).

Security Act. J.S. App. 3 (appellants' "gross income (including Social Security benefits) was over $88,000").[2] Accordingly, they included in gross income on their 1984 federal income tax return one-half of their $20,798 in social security benefits (*ibid.*).

Under Neb. Rev. Stat. § 77-2715 (1986), state income-tax liability for 1984 was computed by applying the appropriate state income-tax rate to the federal tax liability.[3] For appellants, the computation resulted in a state income-tax liability of $3,114. Of that amount, $766 was attributable to appellants' inclusion of one-half of their social security benefits in gross income on their federal return. J.S. App. 4.

Appellants filed a claim for a refund with appellee Donna Karnes, Nebraska State Tax Commissioner, contending that federal law precludes Nebraska from subjecting social security benefits to state income taxation. After the claim was denied, appellants filed this action against appellee Karnes and appellee Nebraska Department of Revenue in the District Court of Nuckolls County, Nebraska, seeking a re-

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[2] Hereafter, unless otherwise indicated, "social security benefits" in this brief refers to benefits received under Title II of the Social Security Act. We adopt that common usage for simplicity, even though 26 U.S.C. (Supp. IV) 86 uses the phrase to refer both to such Title II benefits and to certain railroad retirement benefits. We hereafter refer to the covered railroad retirement benefits separately.

[3] Nebraska law has subsequently been amended so that the state income tax is no longer based directly on the federal tax liability, but on federal adjusted gross income. Neb. Rev. Stat. § 77-2715 (Supp. 1987). The Nebraska tax scheme at issue in this case and discussed in this brief is the scheme in effect for 1984, but the recent amendments do not alter the analysis.

fund of that part of their state income taxes which was attributable to inclusion in gross income of one-half of their social security benefits (J.S. App. 2). The district court rejected appellants' challenge and granted summary judgment in favor of appellees (*id.* at 2-3).

3. The Supreme Court of Nebraska affirmed (J.S. App. 1-17). The court first held that state law prohibited appellants from bringing their refund suit as a class action (*id.* at 4-5). It then rejected each of appellants' federal preemption claims.

The court first rejected appellants' claim, based on the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, that the state income tax impermissibly impairs Congress's power to provide for the general welfare under the Social Security Act (J.S. App. 6-9). The court recognized that the Social Security Act was enacted by Congress in order to "'save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near'" (*id.* at 7, quoting *Helvering* v. *Davis*, 301 U.S. 619, 641, 641 (1937)). But the court disagreed with appellants' contention that *any* state taxation of any social security benefits would burden the intended operation of the federal program (*ibid.*). Thus, the court explained that the 1983 Congress had determined that certain higher income taxpayers, such as appellants, should have up to half of their social security benefits treated like other retirement benefits and therefore be subject to federal income tax (*id.* at 7-8, quoting H.R. Rep. 98-25, 98th Cong., 1st Sess. 24 (1983)).[4] The

[4] Prior to the 1983 amendments, benefits received under Title II of the Social Security Act were not subject to federal income tax. As the 1983 Congress recognized, however, that

court concluded that Nebraska's income tax, which is imposed on the same benefits of the same taxpayers as the federal income tax, no more threatens to destroy the ameliorative purposes of the Social Security Act than does the federal tax (*id.* at 8-9).

The Nebraska Supreme Court next ruled (J.S. App. 9-13) that state taxation of social security benefits is not prohibited by Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), which states:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Appellants argued that the word "levy" in Section 207(a) refers to a "tax levy" (J.S. App. 10). The court rejected the argument, concluding that, while "levy" is sometimes used to refer to a legislative imposition of a tax, Section 207(a) uses the term to refer to " '[t]he obtaining of money by legal process through seizure and sale of property' " (J.S. App. 10, quoting *Black's Law Dictionary* 816 (5th ed. 1979)).

The court pointed out (J.S. App. 11) that the words surrounding "levy" clearly show that Section 207(a) refers only to judicial proceedings or "other

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result was not based on statutory prohibition on such taxation. Rather, it was based on a series of Internal Revenue Service rulings beginning in 1938. I.T. 3194, 1938-1 C.B. 114; I.T. 3229, 1938-2 C.B. 136; I.T. 3447, 1941-1 C.B. 191; Rev. Rul. 70-217, 1970-1 C.B. 12-13. See S. Rep. 98-23, 98th Cong., 1st Sess. 25 (1983); H.R. Rep. 98-25, 98th Cong., 1st Sess. 23 (1983).

legal process" to collect money due, not to taxes imposed by legislative bodies. The court further observed (J.S. App. 12-13) that Section 207(a)'s omission of any reference to taxes contrasts sharply with the express protection against taxation in 45 U.S.C. (& Supp. III) 231m, which provides that certain railroad retirement benefits (including those covered by 26 U.S.C. (Supp. IV) 86) are not subject "to any tax or to garnishment, attachment, or other legal process." Especially in light of the rule that "exemptions from taxation are to be narrowly construed" (J.S. App. 12, citing *Bingler* v. *Johnson*, 394 U.S. 741 (1969)), the court explained (*id.* at 12-13), Section 207(a) should not be construed to protect against taxation when Congress failed to borrow the readily available language of 45 U.S.C. (& Supp. III) 231m, which "clearly sets out how to exclude federal benefits from state taxation." No contrary conclusion, the court further stated (J.S. App. 12), can be based on the parenthetical reference to Section 207 in 26 U.S.C. (Supp. IV) 86(a), which provides that certain taxpayers must include up to one-half of their social security benefits in gross income "(notwithstanding section 207 of the Social Security Act)."[5] Despite that reference, the court explained (J.S. App. 12), Section 207(a) cannot be read as a "specific indication of congressional intent to prohibit state taxation of Social Security benefits."[6]

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[5] Section 86(a) states: "Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act) includes social security benefits in an amount equal to the lesser of—(1) one-half of the social security benefits received during the taxable year, or (2) one-half of the excess described in subsection (b)(1)."

[6] The Nebraska Supreme Court also rejected appellants' contention that the Nebraska tax is prohibited by 31 U.S.C.

DISCUSSION

The Nebraska Supreme Court correctly concluded that Nebraska's income tax scheme is not preempted by Section 207(a) of the Social Security Act or by the policy of the Act as a whole. The decision does not conflict with any decision of this Court or of any other court. Plenary review by this Court is not warranted.[7]

1. This Court has repeatedly stated that federal statutory preemption of the exercise of traditional state legislative powers is not " 'lightly to be presumed' " (*New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz* v. *Texas*, 344 U.S. 199, 203 (1952)), but is to be inferred only when displacement of state power "was the clear and manifest purpose of Congress" (*Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, No. 86-1406 (Apr. 19, 1988), slip op. 4 (internal quotation marks and citations omitted)). See

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3124, which declares that obligations of the federal government are exempt from state taxation (J.S. App. 14-17). Appellants do not renew that contention in this Court.

[7] In addition to Nebraska, twelve states subject federally taxable social security benefits to state income tax, all by defining the state tax base by reference to the federal tax base. Colo. Rev. Stat. § 39-22-103 (1982 & Supp. 1987); Iowa Code Ann. § 422.7 (West 1971 & Supp. 1988); Kan. Stat. Ann. § 79-32,117(a) (1984 & Supp. 1987); Minn. Stat. Ann. § 290.01 subd. 19, 20 (West 1962 & Supp. 1988); Mo. Ann. Stat. § 143.121 (Vernon 1966 & Supp. 1988); Mont. Code Ann. § 15-30-101, 15-30-111 (1987); N.D. Cent. Code § 57-38-01 (1983); R.I. Gen. Laws § 44-30-12 (1980); Utah Code Ann. § 59-10-112 (1987); Vt. Stat. Ann. tit. 32, §§ 5811, 5823 (1981 & Supp. 1987); W. Va. Code § 11-21-12 (1987 & Supp. 1988); Wis. Stat. Ann. ch. 71 (West 1969 & Supp. 1987). Apparently, no state currently taxes social security benefits beyond those which are now subject to federal income tax.

also *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). With respect to state taxes in particular, as the Court observed in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 634 (1981) (internal quotation marks and citations omitted), "[p]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." "In cases such as this," the Court further explained, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict" (*ibid.* (footnote omitted)). Moreover, the Court has cautioned that "[a] court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established" (*Rockford Life Ins. Co.* v. *Illinois Dep't of Revenue*, No. 86-251 (June 8, 1987), slip op. 9). See *Smith* v. *Davis*, 323 U.S. 111, 117-119 (1944) (federal statutory exemptions from state taxation "should not be expanded or modified in any degree by the judiciary"); *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606-607 (1943) ("tax exemptions are not granted by implication," and if Congress wishes to preempt certain state taxes, "it should say so in plain words").[8] Nothing in the Social

[8] See also *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), slip op. 3 (it is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved. *E.g.*, *Oklahoma Tax Comm'n* v. *United States*").

Security Act meets the standards for federal preemption of Nebraska's income tax in this case.

2. Appellants' primary claim (J.S. 5-16) is that Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), preempts Nebraska law insofar as it subjects federally taxable social security benefits to state income tax. Appellants have not cited, and we are not aware of, any decision of any court that has construed Section 207(a) to forbid state taxation of social security benefits. And appellants' claim is contrary to the plain language of that provision and all available evidence of its intended meaning.[9]

a. Nebraska's tax scheme plainly does not violate the first clause of Section 207(a), which states that "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity." The Nebraska law does not provide for the transfer or assignment of any taxpayer's right to future social security benefits. It merely creates a liability, based in part on the amount of benefits a taxpayer has received during the tax year, that the taxpayer may satisfy out of any available resources. Nebraska's tax has no effect on

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[9] Appellants base their primary preemption claim on Section 207 as a whole and on 26 U.S.C. (Supp. IV) 86, but the claim is properly construed as a claim about the meaning of Section 207(a). The Title 26 provision simply requires certain taxpayers to include certain amounts in gross income; and Section 207(b) simply states that Section 207(a) may not be limited, superseded, or modified by another law without an express reference to Section 207. Although both provisions might be relevant to construing the language of Section 207(a), neither contains any language that itself could plausibly be regarded as preemptive.

appellants' future receipt of any social security benefits to which they are entitled.

Nor does the Nebraska tax statute come within the protection of the second clause of Section 207(a), which states that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." In particular, as the Nebraska Supreme Court held (J.S. App. 10-13), Nebraska's tax statute does not subject appellants' social security benefits to "levy." That term, as used in Section 207(a), does not refer to a legislative imposition of a tax, although "levy" may have such a meaning in other contexts. Rather, the context makes clear that "levy" in Section 207(a) refers to a form of judicial process directed at obtaining specific property or money (see *Black's Law Dictionary* 816 (5th ed. 1979)). The term "does not stand alone, but gathers meaning from the words around it" (*Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). The surrounding terms—"execution," "attachment," "garnishment"—all refer to judicial processes directed at obtaining specific property or money of a specific person. And the phrase "or other legal process," which refers to "a summons, writ, warrant, mandate or other process issuing from a court" (*Black's Law Dictionary* 1085 (5th ed. 1979)), serves to characterize all the terms in the list preceding the phrase, including "levy."

b. That Section 207(a) does not apply to taxation is confirmed by comparing it with two other anti-assignment/anti-attachment provisions. Tier 1 railroad retirement benefits, which are closely related to

social security benefits,[10] are protected by 45 U.S.C. (& Supp. III) 231m, which provides that no such benefits "shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever." Unlike Section 207(a), that provision expressly grants protection against taxation, in addition to protecting against assignment and "legal process" such as garnishment and attachment. Similarly, 38 U.S.C. (& Supp. IV) 3101(a) provides that benefit payments under laws administered by the Veterans' Administration (VA)

> shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by beneficiary.

Unlike Section 207(a), but like 45 U.S.C. (& Supp. III) 231m, the VA provision expressly protects against taxation, and it does so in a clause separate from the clause protecting against assignment and legal process, including "levy."[11] Anti-taxation lan-

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[10] The amount of the railroad benefits is tied to the amount of benefits under the Social Security Act. See 45 U.S.C. 231b(a)(1), 231c(a)(1), 231c(f)(1). Moreover, tier 1 railroad retirement benefits are reduced by the amount of social security benefits payable to the retired employee, spouse, or divorced wife. 45 U.S.C. 231b(m), 231c(i)(1). Reflecting the offsetting relation between the two kinds of federal benefits, 26 U.S.C. (Supp. IV) 86 includes both within its definition of "social security benefits."

[11] This Court has discussed 38 U.S.C. 3101(a) and 45 U.S.C. 231m on several occasions. See, *e.g.*, *Bennett* v. *Arkansas*,

guage should not be engrafted onto Section 207(a) when Congress omitted such language in that provision while including it in comparable provisions.[12]

c. The legislative history further confirms that Section 207(a) does not preempt state legislation that imposes taxes (although, of course, it may bar certain legal processes that taxing authorities might use to collect taxes due). Section 207(a) was originally enacted as Section 208 of the Social Security Act of 1935, ch. 531, 49 Stat. 625. There is no reference to taxation either in the 1935 enactment, whose language is identical to what is now Section 207(a), or in the committee reports explaining the provision. H.R. Rep. 615, 74th Cong., 1st Sess. 21 (1935); S. Rep. 628, 74th Cong., 1st Sess. 32 (1935); H.R. Conf. Rep. 1540, 74th Cong., 1st Sess. (1935). By contrast, taxation is mentioned in both the texts and legislative histories of the original versions of 38

No. 86-6124 (Mar. 29, 1988) (discussing both 42 U.S.C. (& Supp. III) 407 and 38 U.S.C. 3101(a)); *Rose* v. *Rose*, No. 85-1206 (May 18, 1987) (discussing 38 U.S.C. 3101(a)); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (discussing 45 U.S.C. 231m). On June 27, 1988, the Court noted probable jurisdiction in *Mansell* v. *Mansell*, No. 87-201, to consider the relation between state community property law and 38 U.S.C. 3101(a) (as well as 10 U.S.C. (& Supp. IV) 1408). Nothing in that case should have any bearing on the issues raised in this appeal.

[12] Congress has enacted numerous anti-assignment/anti-attachment provisions that use language comparable to that of Section 207(a) and do not expressly prohibit taxation. *E.g.*, 5 U.S.C. (& Supp. IV) 8346, 8437(e)(2), 8470(a); 7 U.S.C. 1509; 10 U.S.C. (& Supp. IV) 1440; 22 U.S.C. (& Supp. IV) 4060(c); 31 U.S.C. 776(d)(2); 42 U.S.C. 1717. Appellants have not suggested that any such provision has been construed to prohibit taxation.

U.S.C. 3101(a) and 45 U.S.C. 231m, which were enacted, respectively, two days before and 15 days after the Social Security Act (enacted Aug. 14, 1935).[13]

In 1939, Congress reenacted Section 208 of the 1935 Act without change and recodified it as Section 207 of the Social Security Act. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1372. The committee reports' discussions of the section do not mention taxation. Moreover, they summarize the provision without mentioning the statute's reference to "levy," stating: "nor shall any moneys paid or payable [under Title II] be subject to execution or other legal process." H.R. Rep. 728, 76th Cong., 1st Sess. 45 (1939); S. Rep. 734, 76th Cong., 1st Sess. 53 (1939). Plainly, the 1939 Congress intended "levy" to refer, not to taxation, but to a kind of "legal process" akin to "execution," "attachment," and "garnishment."[14] Finally, when the 1983 Congress reenacted the provision, without change, as Section 207(a), it nowhere expressed any intent to alter the provision's meaning. Social Security Amendments of 1983, Pub. L. No. 98-21, § 335(a), 97 Stat. 130; see H.R. Rep. 98-25, 98th Cong., 1st Sess. (1983);

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[13] For 38 U.S.C. 3101(a), see Act of Aug. 12, 1935, ch. 510, § 3, 49 Stat. 609; S. Rep. 1072, 74th Cong., 1st Sess. 6 (1935); H.R. Rep. 16, 74th Cong., 1st Sess. 2 (1935). For 45 U.S.C. 231m, see Act of Aug. 29, 1935, ch. 812, § 10, 49 Stat. 973; S. Rep. 1363, 74th Cong., 1st Sess. 4 (1935); H.R. Rep. 1711, 74th Cong., 1st Sess. 12 (1935).

[14] Cf. 31 U.S.C. 776(d)(2) historical note; H.R. Rep. 97-651, 97th Cong., 2d Sess. 3, 47 (1982) (substituting "subject to legal process" in 31 U.S.C. 776(d)(2) for "subject to execution, levy, attachment, garnishment or other legal process," and explaining that the extra words were omitted as mere "surplus" and not to effect any substantive change).

S. Rep. 98-23, *supra*; H.R. Conf. Rep. 98-47, 98th Cong., 1st Sess. (1983).[15]

d. Administrative and judicial history also provide support for the Nebraska Supreme Court's reading of Section 207(a). In appellants' view, prior to the 1983 addition of 26 U.S.C. (Supp. IV) 86, Section 207 barred not just state but also federal taxation of social security benefits. Yet, when the Internal Revenue Service determined in 1938 (and again in 1941 and in 1970) that social security benefits were not subject to federal tax, it nowhere mentioned Section 207. See note 4, *supra*.[16] Similarly, no decision of this Court or of any other court, to our knowledge, has construed Section 207(a) as applying to taxation. See, *e.g.*, *Philpott* v. *Essex County Welfare Bd.*,

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[15] The 1983 amendments added subsection (b) to Section 207, 42 U.S.C. (& Supp. IV) 407(b). The new subsection provides:

> No other provision of law, enacted before, on, or after the date of the enactment of this section [April 20, 1983], may be construed to limit, supersede, or otherwise modify the provision of this section except to the extent that it does so by express reference to this section.

Congress added that provision because a number of bankruptcy courts had construed the Bankruptcy Reform Act of 1978, 11 U.S.C. (& Supp. IV) 101 *et seq.*, as implicitly superseding Section 207's declaration that social security benefits are not subject "to the operation of any bankruptcy or insolvency law" and had therefore assigned such benefits to trustees in bankruptcy. The new provision was designed to eliminate that practice. See H.R. Conf. Rep. 98-47, 98th Cong., 1st Sess. 153 (1983); H.R. Rep. 98-25, *supra*, at 82-83. There is no other discussion of Section 207 in the legislative history.

[16] In fact, the decisions give no reason at all for the determination that social security benefits are not subject to federal income tax. They merely announce the determination.

409 U.S. 413, 417 (1973) (describing the provision without any reference to taxation, stating that it "imposes a broad bar against the use of any legal process to reach all social security benefits").

e. As the Nebraska Supreme Court ruled (J.S. App. 12), a contrary conclusion cannot be based on Congress's reference to Section 207 when it provided, in 26 U.S.C. (Supp. IV) 86(a), for inclusion of certain social security benefits in gross income for federal income-tax purposes "(notwithstanding section 207 of the Social Security Act)." The parenthetical reference, of course, does not directly modify the language of Section 207(a); nor does it purport to alter the meaning of Section 207(a) even indirectly. Nor, indeed, does the parenthetical state that the new tax provision (or any taxation) is in fact inconsistent with Section 207(a). It merely states that the tax provision governs *if* there is any inconsistency. Such a provision cannot expand the scope of Section 207(a) to preempt state taxation that would otherwise be outside the reach of Section 207(a) and within traditional state legislative powers.

Moreover, the legislative history of the 1983 amendments suggests that the parenthetical reference to Section 207 was added only as a precautionary measure, not because Congress believed that Section 207(a) generally prohibited taxation of social security benefits. Both houses (and their respective committees) proposed bills that provided for the same taxation of social security benefits as ultimately was contained in 26 U.S.C. (Supp. IV) 86, but neither house (or committee) made any reference to Section 207 in that context. See S. Rep. 98-23, *supra*; 129 Cong. Rec. S3006 (daily ed. Mar. 16, 1983); H.R. Rep. 98-25, *supra*, at 47, 82-83, 314; 129 Cong. Rec.

4573, 4623-4633 (1983). The parenthetical reference to Section 207 was added in conference, and the Conference Report does not offer any explanation. H.R. Conf. Rep. 98-47, *supra*, at 70, 153.

The context in which the parenthetical was added —in Section 335 of the 1983 amendments, 97 Stat. 130—suggests the source of the drafters' caution. Subsection (a) of Section 335 added Section 207(b) to the Social Security Act, which requires an express reference to Section 207 before that provision can be overridden or modified. See note 15, *supra*. Subsection (b) of Section 335 then added express references to Section 207 to three other provisions. The addition to the new Section 86(a) of the Internal Revenue Code, in subsection (b)(2)(A), was sandwiched between two provisions in which similar references to Section 207 serve an evident function. Subsection (b)(1) added such a reference to 42 U.S.C. (& Supp. IV) 659, which makes an exception to Section 207 for legal process brought for the enforcement of child-support and alimony obligations. Subsection (b)(2)(B) added a Section 207 reference to the new Section 871(a)(3)(A) of the Internal Revenue Code (26 U.S.C. (Supp. IV)), which requires inclusion of certain social security benefits in *nonresident aliens*' gross income. That addition is explainable as a response to the fact that such income is expressly made subject to a 30% withholding by 26 U.S.C. (& Supp. IV) 1441. Although social security benefits included in gross income under 26 U.S.C. (Supp. IV) 86 are currently not subject to withholding (see Rev. Rul. 84-173, 1984-2 C.B. 16), caution apparently led the drafters to include the Section 207 reference in this section as well.

3. Appellants' secondary preemption claim (J.S. 16-20) is that, even if no specific statutory provision precludes Nebraska's tax, the tax is preempted because it would impair the policies of the social security program as a whole. As the Court in *Commonwealth Edison Co.* warned, however, in cases involving claims of federal preemption of state taxes, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes" (453 U.S. at 634). Aside from Section 207(a), appellants have pointed to nothing in the Social Security Act itself or in its legislative history that expresses any congressional intent to preempt state taxes, either prior to or after the 1983 amendments. And the Nebraska tax, which applies only to those social security benefits which are subject to federal income tax, does not conflict in any way with the Social Security Act's policies.

Even prior to the 1983 amendments, it was hardly clear whether anything in the Social Security Act preempted state taxation of social security benefits. To be sure, prior to 1984, social security benefits were not subject to federal income tax. But, as Congress expressly recognized (S. Rep. 98-23, *supra*, at 25; H.R. Rep. 98-25, *supra*, at 23-24), that exclusion, unlike the exclusion of tier 1 railroad retirement benefits, was based not on statute but on administrative rulings.[17] And those rulings did not explain what basis, if any, they had in the Social Security Act. Nor did they even mention *state* taxes.

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[17] See 1 S. Surrey, W. Warren, P. McDaniel, & H. Ault, *Federal Income Taxation: Cases and Materials* 296 (1972) (social security benefits are excluded from gross income by administrative ruling, whereas basic railroad retirement benefits and benefits under Veterans' Administration statutes are excluded from gross income by statute).

Nonetheless, it might at least have been argued before 1984, as it might be argued today, that the ameliorative purposes of the Social Security Act (see *Helvering* v. *Davis*, 301 U.S. at 641, quoted at J.S. App. 7 and page 4, *supra*) warrant an inference that Congress intended to prohibit taxation of benefits that are needed to meet basic living expenses. Even if that argument is correct, however, the Nebraska tax, like the current federal income tax, would not appear to run afoul of any such intent. The tax reaches the social security benefits only of higher income taxpayers, who should have enough other resources to meet basic expenses. See, *e.g.*, H.R. Rep. 98-25, *supra*, at 24 ("lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits"; "only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive").

Perhaps, prior to 1984, it might have been argued that the Act established an even stronger policy, requiring that all social security benefits should end up in the beneficiaries' pockets as nontaxable disposable income. Cf. *Ridgway* v. *Ridgway*, 454 U.S. 46, 61 (1981) (Congress wanted to ensure that military group life insurance benefits would " 'actually reach the beneficiary,' " quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. at 584 (same for railroad retirement benefits)). Whatever the implied policies of the pre-1984 Act, however, it is the policies in place beginning in 1984 that are at issue in this case. There clearly is no inconsistency between the Nebraska tax and the post-1983 policies.[18]

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[18] We note that the insurance proceeds at issue in *Ridgway* were covered by 38 U.S.C. 770(g), which expressly bars taxa-

Congress's decision to subject a certain fraction of social security benefits for some taxpayers to federal income tax shows that the post-1983 Social Security Act embodies no policy that all benefits should end up as disposable funds in the pockets of all beneficiaries. Nebraska's tax on precisely the same benefits therefore impairs no such policy. Moreover, Congress made clear that the benefits it decided to tax should be viewed, not as tax-free social-welfare payments, but as a form of retirement pay and hence taxable, like other kinds of retirement pay in excess of paid-in contributions (see 26 C.F.R. 1.61-2(a)). S. Rep. 98-23, *supra*, at 25; H.R. Rep. 98-25, *supra*, at 24.[19] Nebraska's taxing of the same amount of benefits merely follows the federal government's characterization of those benefits.

Finally, given many states' longstanding practice of basing their income taxes on the federal tax base, state taxation of federally taxable social security benefits is a wholly predictable consequence of Congress's decision to include such benefits in gross income for federal tax purposes. Without a clear indication that Congress intended to sever the usual connection be-

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tion. Similarly, the benefits at issue in *Hisquierdo* were covered by 45 U.S.C. 231m, which also expressly bars taxation. As we have explained, social security benefits have never been expressly protected from taxation by federal statute.

[19] The tax is limited to one-half of such benefits in order roughly to approximate a tax limited to the benefits that are attributable to employers' social security contributions rather than to employees' own social-security (after-tax) contributions. See H.R. Rep. 98-25, *supra*, at 24 ("The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions.").

tween state and federal tax bases, it cannot be inferred that Congress intended to prohibit state taxation of those benefits that it subjected to federal income tax. *Cf. Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 608 ("Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.").[20] There is no such evidence in the 1983 amendments to the Social Security Act.[21]

In sum, there is no sound basis for concluding that Congress has exempted federally taxable social security benefits from a state tax like Nebraska's. Appellants' appeal from the Nebraska Supreme Court decision therefore presents no substantial federal question.

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[20] In *Xerox Corp.* v. *County of Harris, Texas*, 459 U.S. 145 (1982), and *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), which appellants cite (J.S. 17), the Court found state taxes preempted where the federal government tried to encourage certain activities by specifically exempting them from federal tax.

[21] There appears to be no reference to the question of state taxation of social security benefits in the legislative history of the 1983 amendments. In particular, although the estimated impact of those amendments on both federal and state tax revenues would be affected by possible state income taxation of social security benefits (state revenues directly, federal revenues by virtue of the deductibility of state income taxes (26 U.S.C. 164(a)(3)), the assumptions that were made about such state taxation in making those estimates are not reflected in the committee reports (S. Rep. 98-23, *supra*, at 2-4, 72, 78-79; H.R. Rep. 98-25, *supra*, at 161, 173-174, 178-179) or, indeed, in the *Report of the National Committee on Social Security Reform* (1983), from which the 1983 amendments derived (*id.* at App. K, 49-52).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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